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Voting-Priority Qualifications for Voting in Special Purpose Districts Beyond the Scope of One Man-One Vote

Micheal Goldsmith

RECENT DEVELOPMENTS

Voting—PROPERTY QUALIFICATIONS FOR VOTING IN SPECIAL PURPOSE DISTRICTS: BEYOND THE SCOPE OF "ONE MAN-ONE VOTE"

Salyer Land Co. v. Tulare Lake Basin Water Storage District, 410 U.S. 719 (1973)

Property qualifications on the right to vote antedate the Constitution.[1] Indeed, such restrictions were still being imposed by ten of the original thirteen states when the Constitution was adopted.[2] "[T]he underlying idea was that a man's property entitled him to vote—not his character, his nationality, beliefs, or residence, but his property."[3]

By the 1960's, such a philosophy had become an anachronism. Early in the decade, the Supreme Court, in *Wesberry v. Sanders,*[4] and *Reynolds v. Sims,*[5] held that the fourteenth amendment prohibited the dilution of the effectiveness of a citizen's vote through the

[1] One writer, prominent at the turn of the century, stated: "During the seventeenth century some property qualification upon voters was implied in the laws and customs of many of the colonies, and in the eighteenth century such a requirement was universal." A. MCKINLEY, THE SUFFRAGE FRANCHISE IN THE THIRTEEN ENGLISH COLONIES IN AMERICA 478 (1905); *see* M. CHUTE, THE FIRST LIBERTY: A HISTORY OF THE RIGHT TO VOTE IN AMERICA 1619-1850 (1969); C. WILLIAMSON, AMERICAN SUFFRAGE FROM PROPERTY TO DEMOCRACY 1760-1860 (1960).

[2] K. PORTER, A HISTORY OF SUFFRAGE IN THE UNITED STATES 110 (1918).

[3] *Id.* at 3; *see* A. DE GRAZIA, PUBLIC AND REPUBLIC: POLITICAL REPRESENTATION IN AMERICA 56, 91-92, 117 (1951); C. WILLIAMSON, *supra* note 1, at 5.

A common justification made in support of this position is that the ownership of property ensures that the voter has the requisite interest in community affairs which will motivate him to vote responsibly. Dissenting in Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966), Justice Harlan took a similar position:

> It is . . . arguable, indeed it was probably accepted as sound political theory by a large percentage of Americans through most of our history, that people with some property have a deeper stake in community affairs, and are consequently more responsible, more educated, more knowledgeable, more worthy of confidence, than those without means, and that the community and Nation would be better managed if the franchise were restricted to such citizens.

Id. at 685; *see* J. PHILLIPS, MUNICIPAL GOVERNMENT AND ADMINISTRATION IN AMERICA 175 (1960).

However appealing these explanations may have been at one time, no state today imposes property requirements for voting in general elections. XIX COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 1972-1973, at 30 (1972). Nevertheless, as of 1969, at least fourteen states imposed some property restrictions on voting rights in nongeneral elections. *See* Note, *Property Ownership Versus the Right To Vote: A Question of Equal Protection,* 25 SW. L.J. 633, 638 n.41 (1971).

[4] 376 U.S. 1 (1964).

[5] 377 U.S. 533 (1964).

malapportionment of congressional and state legislative districts. Then, after some initial hesitation,[6] the Court extended its "one man-one vote" rationale to elections for representatives in local government bodies as well.[7]

Underlying the Court's reapportionment decisions was a belief that voting is a fundamental right.[8] As Justice Black, speaking for the Court in *Wesberry* said: "Other rights, even the most basic, are illusory if the right to vote is undermined."[9] Once acknowledged to be fundamental, the right to vote was placed at the forefront of an evolving "two-tier"[10] equal protection doctrine which added sub-

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[6] Specifically, the Court had not required strict adherence to the one man-one vote principle in local situations where appointive or administrative schemes were involved (*see* Sailors v. Kent Bd. of Educ., 387 U.S. 105 (1967)) and where leeway for experimentation and innovation was essential in order to promote a political compromise in a city-county consolidation. *See* Dusch v. Davis, 387 U.S. 112 (1967). *Compare* notes 80-84 *infra*.

[7] Hadley v. Junior College Dist., 397 U.S. 50 (1970); Avery v. Midland County, 390 U.S. 474 (1968).

[8] *See, e.g.,* Reynolds v. Sims, 377 U.S. 533, 561-66 (1964); Wesberry v. Sanders, 376 U.S. 1, 17-18 (1964).

[9] 376 U.S. at 17. The Court in *Reynolds* similarly stated:

> Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized. Almost a century ago in *Yick Wo v. Hopkins,* 118 U.S. 356, the Court referred to "the political franchise of voting" as "a fundamental political right, because preservative of all rights."

377 U.S. at 561-62.

[10] In applying the two-tier equal protection approach the first tier represents traditional equal protection analysis while the second reflects the development of a more demanding test. Under the traditional approach the Court's focus is directed towards determining whether the challenged statute is rationally related to the stated legislative purpose. This approach presumes that the statute is constitutional and it will not be struck down unless it is shown to be without a rational basis—*i.e.,* "wholly irrelevant to achievement of the regulations' objectives." Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552, 556 (1947); *see* note 53 *infra*. The rationality test has recently been applied by the Supreme Court in several noteworthy cases. *See* note 65 *infra*. For examples of its earlier application, see Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Tigner v. Texas, 310 U.S. 141 (1940); Smith v. Cahoon, 283 U.S. 553 (1931); F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920); Miller v. Wilson, 236 U.S. 373 (1915); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911).

Under the second tier the Court has determined that when the classification "operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution" a compelling interest test is to be applied and the statute is subjected to "strict judicial scrutiny." San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 17 (1973). Strict judicial scrutiny essentially means that the statute is "not entitled to the usual presumption of validity, and that the State rather than the complainants must carry a 'heavy burden of justification.' " *Id.* at 16. Examples of suspect classifications and fundamental rights which have motivated the Court to apply this higher standard of review are cited in notes 13-14 *infra*.

stantive gloss to the fourteenth amendment.[11] Traditional equal protection analysis (representing the first tier) would sustain a statute simply if it were rationally related to a legitimate state objective.[12] However, under a strict scrutiny equal protection approach (representing the second tier) any provision infringing upon a fundamental[13] right or establishing a suspect[14] classification would be subjected to the rigors of close judicial scrutiny, and would ultimately be upheld only if the state could establish that the law was necessary in order to promote a compelling state interest.

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[11] The concept of strict scrutiny equal protection and the nature of its implications has received notable recognition in recent years:

> At the beginning of the 1960's, judicial intervention under the banner of equal protection was virtually unknown outside racial discrimination cases. The emergence of the "new" equal protection during the Warren Court's last decade brought a dramatic change. Strict scrutiny of selected types of legislation proliferated. The familiar signals of "suspect classification" and "fundamental interest" came to trigger the occasions for the new interventionist stance. The Warren Court embraced a rigid two-tier attitude. Some situations evoked the aggressive "new" equal protection, with scrutiny that was "strict" in theory and fatal in fact; in other contexts, the deferential "old" equal protection reigned, with minimal scrutiny in theory and virtually none in fact.
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> . . . The fundamental interests ingredient of the new equal protection was particularly open-ended. It was the element which bore the closest resemblance to freewheeling substantive due process, for it circumscribed legislative choices in the name of newly articulated values that lacked clear support in constitutional text and history.

Gunther, *The Supreme Court 1971 Term, Foreword: In Search of Evolving Doctrine On A Changing Court*, 86 HARV. L. REV. 1, 8 (1972) (footnotes omitted); *see* Cox, *The Supreme Court 1965 Term, Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966); Michelman, *The Supreme Court 1968 Term, Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1076-1133 (1969). *See also* Note, *The Decline and Fall of the New Equal Protection: A Polemical Approach*, 58 VA. L. REV. 1489 (1972); Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123 (1972).

[12] For a discussion of the rational relationship test, see notes 10-11 *supra*.

[13] The meaning of this term cannot be readily defined. The Court has suggested that a fundamental right is one which is "explicitly or implicitly protected by the Constitution." San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 17 (1973). The Court has recognized the right to procreate, the right to privacy, and the right to travel as fundamental. *See* Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel); Griswold v. Connecticut, 381 U.S. 479 (1965) (right to privacy); Skinner v. Oklahoma, 316 U.S. 535 (1942) (right to procreate).

[14] The Court in *Rodriguez* set forth the following characteristics as "traditional indicia of suspectness": the class is "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." 411 U.S. at 28; *see, e.g.*, Graham v. Richardson, 403 U.S. 365 (1971) (nationality); Williams v. Rhodes, 393 U.S. 23 (1968) (political allegiance); Loving v. Virginia, 388 U.S. 1 (1967) (race); Korematsu v. United States, 323 U.S. 214 (1944) (race); *cf.* Levy v. Louisiana, 391 U.S. 68 (1968) (illegitimacy). *See also* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (wealth); Douglas v. California, 372 U.S. 353 (1963) (wealth); Griffin v. Illinois, 351 U.S. 12 (1956) (wealth).

It was inevitable that if the Court were willing to apply strict scrutiny to state apportionment statutes which diluted a citizen's vote, "[n]o less rigid an examination [was] applicable to statutes *denying* the franchise to citizens who are otherwise qualified by residence and age."[15] And in *Kramer v. Union Free School District No. 15*,[16] the Supreme Court took such a step. The plaintiff in *Kramer* was challenging, on equal protection grounds, a New York statute which restricted voting in school board elections essentially to property owners and parents living in the district, thereby denying the franchise to otherwise qualified district residents. The *Kramer* Court gave the statute a "close and exacting" examination, and stipulated that any provision which "grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others" must be necessary to promote a compelling state interest if it is to pass constitutional muster.[17] Reserving judgment on "whether the State in some circumstances might limit the exercise of the franchise to those 'primarily interested' or 'primarily affected,' " the Court struck down the property restriction because a close scrutiny of the statute demonstrated that it did not accomplish its stated goal of limiting the franchise to community members who were, in fact, most interested in school board affairs.[18]

The principles articulated in *Kramer* were subsequently reinforced in *Cipriano v. City of Houma*,[19] and *City of Phoenix v.*

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[15] Kramer v. Union Free School Dist. No. 15, 395 U.S. 621, 626 (1969) (emphasis in original).

[16] 395 U.S. 621 (1969).

[17] *Id.* at 627. *Kramer* applied this approach after acknowledging the right to vote as fundamental, essentially relying on the statement to this effect made in *Reynolds*. *Id.* at 626.

[18] *Id.* at 632. The Court explained that

> whether classifications allegedly limiting the franchise to those resident citizens "primarily interested" deny those excluded equal protection of the laws depends, *inter alia*, on whether all those excluded are in fact substantially less interested or affected than those the statute includes.

Id. Given this analysis the majority concluded that the statutory classifications allowed "inclusion of many persons who have, at best, a remote and indirect interest . . . and, on the other hand, exclude others who have a distinct and direct interest." *Id.* On this basis the law was held to be unconstitutional.

[19] 395 U.S. 701 (1969). *Cipriano* involved a challenge of various provisions of Louisiana law which limited the right to vote to property taxpayers in elections called to determine whether or not revenue bonds would be raised by the municipality for the use of its utility system. Relying on *Kramer*, the Court stated that "if a challenged state statute grants the right to vote in a limited purpose election to some otherwise qualified voters and denies it to others, 'the Court must determine whether the exclusions are necessary to promote a compelling state interest.' " *Id.* at 704. Here too, the Court refused to determine whether property qualifications might be permissible under some circumstances. Instead, the Court relied exclusively on a *Kramer* approach by focusing on whether the statute was precisely

Kolodziejski,[20] where the Court utilized an identical equal protection analysis to strike down property ownership requirements which had been established for revenue and general obligation bond elections. Although the Court never explicitly declared property qualifications unconstitutional per se, it had seemingly forced their collapse through a rigid application of the strict scrutiny equal protection approach.[21]

Within this favorable constitutional context, a group of small landowners, residents, and a lessee of the Tulare Lake Basin Water Storage District brought suit in federal court attacking the constitu-

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construed so that "all those excluded are in fact substantially less interested or affected than those the statute includes." *Id.* at 704, *quoting* Kramer v. Union Free School Dist. No. 15, 395 U.S. 621, 632 (1969). On this basis the Court found the law to be in violation of the equal protection clause, noting that both property owners and nonproperty owners were affected by the utility system and together shared the costs of supporting it. 395 U.S. at 705.

[20] 399 U.S. 204 (1970). The plaintiff here attacked the validity of an election scheme which had been adopted to determine the approval of general obligation bonds. Although other sources were available, the ensuing indebtedness was to be financed by property taxes; accordingly, the statute restricted the vote to real property taxpayers. The Supreme Court, through Justice White, held that the equal protection clause was violated by the exclusion of nonproperty taxpayers from these elections. *Id.* at 205. Stating that any such exclusions must be necessary to promote a compelling state interest in order to withstand constitutional attack (*id.* at 205), Justice White stressed that the differences between property taxpayers and nonproperty taxpayers were not substantial enough to justify the existing election scheme. In support of this position Justice White pointed out that all residents have a substantial interest in public facilities and "will be substantially affected by the ultimate outcome of the bond election." *Id.* at 209. He concluded that "[p]resumptively, when all citizens are affected in important ways by a governmental decision subject to a referendum, the Constitution does not permit weighted voting or the exclusion of otherwise qualified citizens from the franchise." *Id.*

[21] *Kramer* itself had an immediate impact on existing state legislation which had preserved certain property restrictions on the right to vote in specified elections.

> Before *Kramer* was decided, only fourteen states still had provisions that restricted the right to vote in elections to property owners. ALASKA CONST. art. V, § 1; ARIZ. CONST. art. VII, § 13; COLO. CONST. art. XI, §§ 6-8; FLA. CONST. art. IX, § 6; IDAHO CONST. art. VIII, § 3; LA. CONST. art. XIV, § 14(a); MICH. CONST. art. II, § 6; MONT. CONST. art. IX, § 2; N.M. CONST. art. IX, § 12; N.Y. EDUC. LAW § 2012 (McKinney 1969); OKLA. CONST. art. X, § 27; R.I. CONST. amend. XXIX, § 2; TEX. CONST. art. VI, § 3(a); UTAH CONST. art. XIV, § 3. Since *Kramer* the specified provisions of the states of Arizona, Louisiana, and New York have been declared unconstitutional by the United States Supreme Court. *See* City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970); Cipriano v. City of Houma, 395 U.S. 701 (1969); Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969). Likewise, the specified provisions of Colorado, Idaho, New Mexico, Oklahoma, and Utah have been declared unconstitutional by the highest court of each of those states. *See* Pike v. School Dist. No. 11, 474 P.2d 162 (Colo. 1970); Muench v. Paine, 94 Idaho 12, 480 P.2d 196 (1971); Board of Educ. v. Maloney, 82 N.M. 167, 477 P.2d 605 (1970); City of Spencer v. Rayburn, 483 P.2d 735 (Okla. 1971); Cypert v. Washington County School Dist., 24 Utah 2d 419, 473 P.2d 887 (1970).

Note, *supra* note 3, at 638 n.41; *see* Note, *The Last Bastion Crumbles: All Property Restrictions on the Franchise are Unconstitutional*, 1 N.M.L. REV. 403 (1971); Note, *Voting Rights—Ownership of Property No Longer a Valid Qualification*, 23 SW. L.J. 964 (1969).

tionality of two statutory provisions of the California Water Storage District Act.[22] The statute reflected a conscious effort by the California legislature to limit the franchise to those who were ostensibly most affected by district affairs, and therefore who would be most interested in district elections. Accordingly, the right to vote in elections for the district board of directors was limited to landowners. Moreover, votes were weighted according to the assessed valuation of each voter's land.[23] This latest challenge to restrictions on the franchise imposed by states in local governmental affairs provided the Court with an opportunity once again to expand upon the rationale of *Kramer*.

However, this particular equal protection challenge was distinguished from earlier voting cases because the object of the plaintiffs' attack was the voting structure of a special purpose district,[24] a unit of local government historically designed to provide an individualized response to the special problems of a particular locality.[25] A three-judge district court denied the plaintiffs' request

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[22] The type of local governmental unit whose election procedure was challenged is a water storage district organized in accordance with the California Water Storage Act. *See* CAL. WATER CODE §§ 39000-48401 (West 1966).

[23] *Id.* §§ 41000-01. Section 41000 provides as follows: "Only the holders of title to land are entitled to vote at a general election." Section 41001 imposes the following weighted voting scheme: "Each voter may vote in each precinct in which any of the land owned by him is situated and may cast one vote for each one hundred dollars ($100), or fraction thereof, worth of his land."

[24] Special purpose districts "are organized governmental units operating outside the realm of general county government established to perform a single function or multifunctions as authorized by the enabling body creating them." U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, PROFILE OF COUNTY GOVERNMENT 37 (1972). Encompassing such broad areas as health, transportation, sanitation, utilities, education, parks, and agricultural assistance, special purpose districts typically "transcend city, county, and even State boundaries . . . and . . . have been utilized to solve increasingly large and complex problems of our urban, [suburban], and rural populations." B. NOVAK, A SELECTED BIBLIOGRAPHY ON SPECIAL DISTRICTS AND AUTHORITIES IN THE UNITED STATES, ANNOTATED I (1968); *see* J. BOLLENS, SPECIAL DISTRICT GOVERNMENTS IN THE UNITED STATES 1-2, 21-23 (1957); U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, THE PROBLEM OF SPECIAL DISTRICTS IN AMERICAN GOVERNMENT (1964); Hankerson, *Special Governmental Districts*, 35 TEX. L. REV. 1004 (1957); Jones, *The Organization of a Metropolitan Region*, 105 U. PA. L. REV. 538 (1957); Tobin, *The Legal and Governmental Status of the Metropolitan Special District*, 13 U. MIAMI L. REV. 129 (1958).

[25] This particular district consisted of 193,000 acres of farmland located in the Tulare Lake Basin. The district's population at the time this action was initiated was 77 with most of the adults in this group working for one of the four corporations that owned 85% of the district farmland. Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719, 723 (1973). Responsibility for governing the district is given by statute to a board of directors, each of whom is elected from one of the divisions within the district. CAL. WATER CODE §§ 40658, 39929 (West 1966). Elections for these positions are required to be held in odd-numbered years. *Id.* § 41300. The actual duties of the board are set out in § 42200:

to enjoin the district from giving effect to the statutory voting provisions.[26] With one judge partially dissenting, the district court held that "limiting the vote to landowners in this particular water district does not violate plaintiffs' constitutional rights," and that "the 'one man, one vote' cases cited by the plaintiffs are not controlling in this special purpose district."[27] Moreover, the court refused to strike down the water district's proportionate voting system.[28] In *Salyer Land Co. v. Tulare Lake Basin Water Storage District,*[29] the Supreme Court affirmed this ruling.

I

AN EXCEPTION TO "ONE MAN-ONE VOTE"

The appellants' argument challenging the property qualification in district elections was broadly based on the principles which the Supreme Court had set down in the *Kramer, Cipriano,* and *Phoenix* trilogy. Arguably, these decisions, taken together, signaled the Supreme Court's willingness to declare property restrictions on the franchise to be unconstitutional.[30] At the very least, these cases strongly supported the proposition that statutes which selectively distributed the franchise in an attempt to limit voting rights to those ostensibly "primarily interested" or "primar-

> Upon the organization of a district, the board shall make or cause to be made all examinations, surveys, detailed plans and specifications, and estimates of costs for the acquisition, appropriation, diversion, storage, conservation, and distribution of water, any drainage or reclamation works connected therewith, and the generation of hydroelectric energy incident thereto, and the sale and distribution thereof, as may be necessary or requisite to enable the board to ascertain and estimate the requirements and works necessary for the purpose of the district, and the probable cost and to make a report.

Additional responsibilities include the levying of tolls and charges and acquiring, improving, and operating "the necessary works for the storage and distribution of water, and any drainage or reclamation works connected therewith." *Id.* § 43000. Project costs are apportioned "in accordance with the benefits that will accrue to each tract of land held in separate ownership." *Id.* § 46176. Tolls and charges are also levied on a similarly apportioned basis. *Id.* § 43006.

[26] Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 342 F. Supp. 144 (E.D. Cal. 1972).

[27] *Id.* at 146.

[28] *Id.* The court stated that

> § 41001 providing one vote for each $100 of assessed valuation is not unconstitutional as the benefits and burdens to each landowner in the District are in proportion to the assessed value of the land, so permitting voting in the same proportion fairly distributes the voting influence.

Id.

[29] 410 U.S. 719 (1973); *see* Associated Enterprises v. Toltec Watershed Improvement Dist., 410 U.S. 743 (1973) (companion case to *Salyer*).

[30] *See* notes 15-20 and accompanying text *supra.*

ily affected" would be subjected to an "exacting standard of precision," and would ultimately be struck down if they did not effectively meet their stated goal.[31] Moreover, each decision stressed that such statutes must be necessary to promote a compelling state interest if they were to avoid constitutional infirmity. Relying on the Court's earlier precedents, the appellants in *Salyer* maintained that limiting the vote to landowners violated the equal protection clause because the possibility of flood damage and the ensuing loss of jobs gave nonlandowning residents "as much interest in the operations of a [water] district as landowners who may or may not be residents."[32]

However persuasive *Kramer, Cipriano,* and *Phoenix* may once have been, the Court was unwilling to acknowledge their applicability to *Salyer.* Speaking through Justice Rehnquist, the majority was quick to point out that in the cases relied on by the appellants, the Court had not absolutely forbidden the states from limiting the franchise to citizens primarily affected by a local governmental unit (at the expense of those only remotely concerned).[33] Rather, in *Kramer, Cipriano,* and *Phoenix,* the particular schemes under attack had simply gone too far—excluding from the franchise those who should have been included, and including those who might have been excluded.[34] In contrast, the California scheme under consideration in *Salyer* was drawn artfully enough to avoid such infirmities.

Of even greater significance was the character of the governmental unit under attack in *Salyer. Cipriano, Phoenix,* and even *Kramer* involved units of local government with authority over general governmental affairs, such as education and bonding. On the other hand, *Salyer* involved a Water Storage District—a peculiar creation of Western states designed for the limited function of guaranteeing a sufficient and even flow of water to the land within its jurisdiction. Therefore, it was not difficult to recognize that landowners within the district had overwhelming interests in the successful operation of the district while the interests of other

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[31] Kramer v. Union Free School Dist. No. 15, 395 U.S. 621, 632 (1969); *see* Cipriano v. City of Houma, 393 U.S. 701, 706 (1969); notes 17-20 *supra.*

[32] 410 U.S. at 726. It should be noted that landowners were given the right to vote regardless of whether they were also district residents. A corporation, for example, could own land and still not be considered a district resident. Furthermore, as the opinion points out, mere residency without landownership does not entitle the resident to vote. *Id.* at 730.

[33] *Id.* at 726-27.

[34] *Id.*

residents were correspondingly remote. Such a classification could not be easily made in prior cases.[35]

Strangely absent from the *Salyer* discussion of *Kramer* was any mention of the character of voting as a fundamental right and of the *Kramer* Court's emphasis on applying strict judicial scrutiny to any state scheme which sought to limit the franchise.[36] *Kramer* had emphasized that the basis of the Court's earlier one man-one vote decisions was the recognition that voting was a right of citizenship and was not given to citizens because of their membership in any particular interest groups. Any state scheme which denied to citizens, otherwise qualified by age and residence, the right to vote because of an economic or other interest group analysis was automatically suspect.[37]

Instead, the *Salyer* Court turned to two pre-*Kramer* decisions to support its reasoning. In *Avery v. Midland County*,[38] the Court extended the principle of one man-one vote to an election for county commissioners. This was the first application of the doctrine to a local governmental body. However, the *Avery* Court in dictum suggested that there may be special purpose units of local government to which the principle of one man-one vote need not be applied.[39] Two years later, in *Hadley v. Junior College Dis-*

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[35] Significantly, the *Salyer* Court did not attempt to directly explain why the school district in *Kramer* could not have been considered a special purpose district, and accordingly why these issues were not initially raised in that context. This is particularly puzzling in light of the fact that the school districts' functions are "judged by many people . . . to be the most important of all governmental undertakings." Bollens, *supra* note 24, at 181. A simple explanation might be that the school district in *Kramer* did not have sufficient autonomy to be considered a special purpose district for the Court's purposes. The *Kramer* Court acknowledged that "the school district maintains significant control over the administration of local school district affairs" but also pointed out that generally "the board of education has the basic responsibility for local school operation." 395 U.S. at 623-24; *see* J. BOLLENS, *supra* note 24, at 179-227. The Court's failure to distinguish *Kramer* more precisely on a factual basis is consistent with its reluctance to set down definitive standards with respect to which special purpose units fall within the scope of its ruling. For a better explanation of the reasoning underlying this aspect of the Court's decision, see notes 85-93 and accompanying text *infra*.

[36] 395 U.S. at 626.

[37] In *Reynolds*, the Court specifically noted that "[l]egislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests." 377 U.S. at 562. This point is later reinforced in the opinion when the Court states that "neither history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation. Citizens, not history or economic interests, cast votes." *Id.* at 579-80.

[38] 390 U.S. 474 (1968).

[39] The *Avery* Court raised the following set of circumstances as a possible exception to the *Reynolds* rule:

trict,[40] the Court extended its application of the *Reynolds* principle to the election of junior college district trustees who, although having powers of a lesser scope than those of the Midland County Commissioners, were nevertheless considered to be exercising "important governmental functions" which had "sufficient impact throughout the district."[41] However, here too, the Court used dicta to repeat its warning that, in the case of local governmental bodies, there might be an exception to the principle of one man-one vote:

> It is of course possible that there might be some case in which a State elects certain functionaries whose duties are so far removed from normal governmental activities and so disproportionately affect different groups that a popular election in compliance with *Reynolds* . . . might not be required . . . .[42]

Justice Rehnquist, speaking for the majority in *Salyer,* characterized the Tulare Lake Basin Water Storage District, "by reason of its special limited purpose and of the disproportionate effect of its activities on landowners as a group," as precisely the sort of governmental unit contemplated in *Avery* and *Hadley* as an exception to the one man-one vote rule.[43] Since the special purpose district exercised relatively limited authority, provided no other general public services, and imposed disproportionate economic burdens on landowners, "it is quite understandable that the statutory framework for election of directors . . . focuses on the land benefited rather than on people as such."[44] Accordingly, the one man-one vote *Reynolds* principle was held to be inapplicable to the Tulare Lake Basin Water Storage District.[45]

In a strong dissent, Justice Douglas, joined by Justices Brennan and Marshall, took issue with the majority opinion on this ground. *Hadley,* as analyzed by Justice Douglas, represented a significant

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> Were the [county governing body] a *special-purpose unit* of government assigned the performance of functions affecting definable groups of constituents more than other constituents, we would have to confront the question *whether such a body may be apportioned in ways which give greater influence to the citizens most affected by the organization's functions.*

Id. at 483-84 (emphasis added). The Court went on to hold, however, that the Constitution would permit "no substantial variation from equal *population* in drawing districts for units of local government having *general governmental powers over the entire geographic area served by the body.*" *Id.* at 484-85 (emphasis added).

[40] 397 U.S. 50 (1970).

[41] *Id.* at 54.

[42] *Id.* at 56.

[43] 410 U.S. at 728.

[44] *Id.* at 728-30.

[45] *Id.*

departure from the *Avery* test.[46] Contrasting the effect of these two decisions, Justice Douglas noted that under *Avery,* the *Reynolds* principle would be applied to local units exercising "general governmental powers over the entire geographic area served by the body" whereas the *Hadley* decision required only that the particular unit be performing "important governmental functions" having "sufficient impact throughout the district."[47] Justice Douglas's position is well founded. A close analysis of *Hadley* indicates that the Court emphatically rejected the drawing of constitutional distinctions based upon the purpose of an election.[48] Writing for the *Hadley* majority, Justice Black stated that he could not "readily perceive judicially manageable standards to aid in such a task" and that the state's decision to hold an election is a "strong enough indication" that the subject matter involved is important.[49] Therefore, while *Hadley* did recognize the possible existence of an excep-

[46] *Id.* at 739 (Douglas, J., dissenting).

[47] *Id.* at 739-40. For the one man-one vote rule to apply under *Hadley,* the unit need not be exercising general governmental powers; rather, whatever powers it does exercise must be important and have sufficient impact throughout the district. Justice Douglas cited the following excerpt from *Hadley* to support this conclusion:

> "[S]ince the trustees can levy and collect taxes, issue bonds with certain restrictions, hire and fire teachers, make contracts, collect fees, supervise and discipline students, pass on petitions to annex school districts, acquire property by condemnation, and in general manage the operations of the junior college, their powers are equivalent, for apportionment purposes, to those exercised by the county commissioners in *Avery*. . . . [T]hese powers, while not fully as broad as those of the Midland County Commissioners, certainly show that the trustees *perform important governmental functions* . . . and have *sufficient impact throughout the district* to justify the conclusion that the principle which we applied in *Avery* should also be applied here."

Id. at 739-40, *quoting* Hadley v. Junior College Dist., 397 U.S. 50 (1970); *see* Note, *The Impact of Voter Equality on Representational Structures of Local Government,* 39 U. CHI. L. REV. 639, 646 (1972); Note, *Local Reapportionment—"One Man, One Vote" Held Applicable to Special-Function Units of Local Government,* 16 VILL. L. REV. 158, 163 (1970).

[48] 397 U.S. at 54. The Court stated:

> If one person's vote is given less weight through unequal apportionment, his right to equal voting participation is impaired just as much when he votes for a school hoard member as when he votes for a state legislator. While there are differences in the powers of different officials, the crucial consideration is the right of each qualified voter to participate on an equal footing in the election process. It should be remembered that in cases like this one we are asked by voters to insure that they are given equal treatment, and from their perspective the harm from unequal treatment is the same in any election, regardless of the officials selected.

Id. at 55. Similarly, the Court in *Kramer* noted:

> Nor is the need for close judicial examination affected because the district meetings and the school hoard do not have "general" legislative powers. Our exacting examination is not necessitated by the subject of the election; rather, it is required because some resident citizens are permitted to participate and some are not.

395 U.S. at 629.

[49] 397 U.S. at 55.

tion to *Reynolds,* the decision's overall language strongly suggests that the *Avery* exception had been severely limited. Significantly, Justice Harlan's dissent in *Hadley* specifically recognized that the majority's decision took "specialized local entities" from "irrigation districts to air pollution control agencies to school districts" outside the limitation which *Avery* had set down.[50] Accordingly, Justice Rehnquist's conclusion that the water storage district in *Salyer* is "the sort of exception" to the *Reynolds* rule which *Avery* and *Hadley* contemplated, represents an interpretation of the latter decision which gives more of an expansionist scope to the *Avery* exception than a literal reading of *Hadley* would otherwise suggest.[51]

II

THE STANDARD OF REVIEW: *Salyer* AND STRICT SCRUTINY EQUAL PROTECTION

Once it found that the one man-one vote doctrine was not controlling in the case of this special purpose district, the Court proceeded to evaluate the equal protection questions raised by the appellants without subjecting the challenged provisions to close judicial scrutiny or a compelling interest test.[52] Justice Rehnquist, relying on a mere test of rationality, asserted that the statutory provision would not violate the equal protection clause so long as it was not " 'wholly irrelevant to the achievement of the regulation's objectives.' "[53] In applying this rational basis standard Justice Rehnquist emphasized the distribution of benefits and burdens which resulted from the district's operations, and concluded that the state could logically have decided that landowners were the

[50] *Id.* at 60-61 (Harlan, J., dissenting).

[51] Certainly neither *Hadley* nor *Avery* contemplated application of the exception in a situation where the right to vote has been denied and not simply diluted. Yet this is precisely what has happened to the residents and lessees of the Tulare Water District.

[52] Significantly, the federal district court which initially reviewed the case was willing to apply a compelling interest test. Salyer v. Tulare Lake Basin Water Storage Dist., 342 F. Supp. 144, 146 (E.D. Cal. 1972). The court there found that the state had a compelling interest in the election scheme which it had established for the water district. *Id.*

[53] 410 U.S. 730 (1973). This formula was first stated in Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552, 556 (1947). Later, Jnstice Rehnquist recited a similar test in reviewing the equal protection claims of appellant-lessees. 410 U.S. at 732. The standard there was whether "any state of facts reasonably may be conceived to justify" the state's decision. *Id; see* McGowan v. Maryland, 366 U.S. 420, 426 (1961).

[54] 410 U.S. at 730-31. Justice Rehnquist was unimpressed by arguments which suggested that "assessments imposed by the district become a cost of doing business for those who farm within it." *Id.* at 730. Apparently, such an interest was too tenuous. Pointing out that since it was the landowners' property which was subject to any liens potentially imposed

only parties entitled to the franchise.[54] A similar analysis prevailed with respect to the remaining constitutional claims made by the appellants. The appellant lessee had argued that "even if residents may be excluded from the vote, lessees who farm the land have interests that are indistinguishable from those of the landowners."[55] The appellant landowners (all with small land holdings) claimed that the Court's decisions in *Gray v. Sanders,*[56] and *Harper v. Virginia Board of Elections,*[57] mandated a finding that the proportional voting system based on assessed land valuation violated the equal protection clause.[58] Neither claim was successful; in each instance the constitutional attacks were rejected because the Court was able to find a rational basis to support the state policy.[59]

The equal protection analysis undertaken by the *Salyer* Court

by the district, the election scheme instituted may have been necessary as a practical matter to win their support when the district was initially proposed. *Id.* at 731. Compare this analysis with the Court's handling of a somewhat similar lien-oriented argument made by the state in a losing cause in City of Phoenix v. Kolodziejski, 399 U.S. 204, 209-11 (1970). Note also that the *Phoenix* Court was willing to acknowledge indirect effects such as the increased costs of goods and services as an indication that others, besides property owners, had an interest in the election. *Id.* at 211. This is in sharp contrast to the interests Justice Rehnquist was willing to recognize in *Salyer.*

[55] 410 U.S. at 731. Essentially the lessees argued that they had an interest in how much water was available for farming and that they were effectively paying for some of the district's costs through increased rental payments.

[56] 372 U.S. 368 (1963). In *Gray,* Georgia's "county unit" system for weighting votes in primary elections for statewide offices was struck down by the Court because of large disparities between county populations and the number of unit votes each county was alloted. The Court stated that "once the class of voters is chosen . . . we see no constitutional way by which equality of voting power may be evaded." *Id.* at 381. It stressed that votes must be equal regardless of race, sex, occupation, or income. *Id.* at 379-80.

[57] 383 U.S. 663 (1966). In *Harper,* the Supreme Court held that Virginia's poll tax in state elections was unconstitutional. The Court announced that voter qualifications have no relation to wealth and that therefore the equal protection clause of the fourteenth amendment is violated whenever the state makes affluence an electoral standard. *Id.* at 668; *see* Note, *State Poll Tax Prerequisite to Voting—Denial of Equal Protection—Harper v. Virginia State Board of Elections,* 16 AM. U.L. REV. 128, 136 (1966). *See also* Bullock v. Carter, 405 U.S. 134 (1972); Shapiro v. Thompson, 394 U.S. 618, 658-59 (1969) (Harlan, J., dissenting).

[58] 410 U.S. at 733-34.

[59] Justice Rehnquist acknowledged the lessee's interest in district activities but nevertheless maintained that the statute must be upheld if it was not irrational. The Justice reasoned that the statute was rational because giving lessees the vote could create administrative problems as well as subject the system to possible manipulation by large landowners. *Id.* at 732. It was also pointed out that lessees were not without a remedy because they could acquire the vote through contractual negotiation. *Id.* at 733.

Justice Rehnquist could not logically refute the landowners' arguments against the weighted voting system. He simply stated that the appellants' position based on *Harper* and *Gray* "ignores the realities of water storage district operation." *Id.* at 734. Justice Rehnquist was referring to the high costs involved in district activities. After reviewing the nature of these costs and how assessments were made, the proportional voting system was sustained. *Id.* at 734.

represents a sharp break with precedent. Under the established equal protection framework, the right to vote, because of its fundamental nature, has consistently been afforded protection under the more demanding standard of review providing for strict scrutiny and a compelling interest test.[60] The *Salyer* majority, however, was clearly averse to extending similar protection to the appellants' asserted voting rights. Under the framework of strict scrutiny equal protection, the threshold question to be resolved in each case has been whether or not a fundamental right or suspect classification is involved; if so, the higher standard is to be invoked. In all other cases the statute may gain constitutional approval simply if a rational basis can be found to support it.[61] This initial determination has been of considerable consequence because it usually determines the outcome of a case.[62] Yet, ostensibly the *Salyer* Court never dealt with this issue; instead, the rationality standard was applied, seemingly without any discussion concerning the nature of the rights which were at stake.[63] The absence of discussion concerning a matter which, in the past, had been a threshold question of equal protection analysis suggests the possibility of two important developments in the Supreme Court's current approach

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[60] *See* notes 9-11, 13 & 18-20 and accompanying text *supra.*

[61] *See* notes 10-14 and accompanying text *supra.*

[62] It is generally not difficult to discern some rational bases for upholding a statute. *But see* notes 65-67 *infra.* However, a rational basis alone will not support a statute under the higher standard of review where a compelling state interest must also be found. As previously pointed out, the state thus assumes a heavy burden of justification. *See* note 10 *supra.* Furthermore, even when a compelling state interest is established, the statute must also be "precisely tailored" so that it will pass the test of close judicial scrutiny.

> It is not sufficient for the State to show that durational residence requirements further a very substantial state interest. In pursuing that important interest the State cannot choose means that unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with "precision" . . . and must be "tailored" to serve their legitimate objectives . . . . If the [State] acts at all it must choose "less drastic means."

Dunn v. Blumstein, 405 U.S. 330, 343 (1972) (footnote omitted); *see* notes 18-20 and accompanying text *supra.* The Chief Justice has stated: "So far as I am aware, no state law has ever satisfied this seemingly insurmountable standard, and I doubt one ever will, for it demands nothing less than perfection." 405 U.S. at 363. *But see* note 52 *supra.* It has been suggested that no state could ever establish a compelling interest concerning property qualifications on the franchise in light of the fact that most states persevere without any such restrictions. *See* Note, *Restriction of Franchise to Property Owners in Texas School Bond Elections Does Not Violate the Equal Protection Clause of the Fourteenth Amendment,* 49 TEX. L. REV. 1113, 1119 (1971).

[63] Although the majority did not discuss this matter, Justice Douglas's dissent placed considerable emphasis on the right to vote as fundamental and on the constitutional protection it therefore deserves. His arguments were derived from the strict scrutiny equal protection framework as it stood before this case. *See generally* notes 10-11, 18-20 & 36-37 and accompanying text *supra.*

to these issues: (*1*) the strict dichotomy automatically providing fundamental and nonfundamental rights with different degrees of protection may be dissipating; and (2) application of the lower standard of review was effectively predetermined by the Court's recognition of a newly created exception to the principle of one man-one vote.

On one level of analysis, the majority's failure to acknowledge the applicability of heretofore established equal protection principles reflects a "mounting discontent" with a strict two-tier formula.[64] Certainly this is not the first case in recent years where the Court has relied upon the rational basis standard when the higher fundamental interest-strict scrutiny test might readily have been invoked.[65] The *Salyer* decision is the most significant of these, however, because it strikes at a right which has been at the forefront of the "new" equal protection movement.[66] To this extent the decision is indicative of a judicial philosophy which favors the application of the traditional rationality test even when fundamental rights or suspect classifications are involved.[67]

This analysis, albeit plausible and consistent with recent case law,[68] does not adequately explain Justice Rehnquist's initial em-

[64] *See* Gunther, *supra* note 11, at 10-20. However, it should be noted that the Court later confirmed the appropriateness of the basic two-tier approach in San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1 (1973). *See generally* notes 10-11 *supra.*

[65] *See, e.g.,* James v. Strange, 407 U.S. 128 (1972); Jackson v. Indiana, 406 U.S. 715 (1972); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Stanley v. Illinois, 405 U.S. 645 (1972); Humphrey v. Cady, 405 U.S. 504 (1972); Eisenstadt v. Baird, 405 U.S. 438 (1972); Reed v. Reed, 404 U.S. 71 (1971).

[66] Indeed, *Harper* and the reapportionment decisions were once heralded as having presaged "a preferred position for voting rights as key or fundamental rights, somewhat analogous to the special position . . . afforded to first amendment rights." Note, *Elections and Equal Protection—Property and Other Voting Restrictions on Local Elections,* 4 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 431, 442 (1969). It is evident that the Court's position on voting as a fundamental right is unsettled.

[67] Gunther, *supra* note 11, at 12. Note, however, that all the cases cited in note 65, with the exception of *Weber,* effectively protected the rights involved even after applying the "traditionally toothless minimal scrutiny standard." *Id.* at 13-14. Professor Gunther states that "[t]hese are truly startling and intriguing developments. After the years in which the strict scrutiny invalidation and minimal scrutiny nonintervention correlations were virtually perfect, the pattern has suddenly become unsettled." *Id.* at 19.

Ironically, the *Salyer* Court's seeming disregard for the compelling interest test has occurred at a time when California, the state where the Tulare Lake Basin Water Storage District is located, has decided that the strict scrutiny standard is appropriate in reviewing all election provisions containing property qualifications. The Supreme Court of California has even expressed doubt as to the constitutionality of earlier schemes which had been approved under the less rigid standard. *See* Curtis v. Board of Supervisors, 7 Cal. 2d 942, 501 P.2d 537, 104 Cal. Rptr. 297 (1972); Burrey v. Embarcadero Municipal Improvement Dist., 5 Cal. 3d 671, 682 n.8, 488 P.2d 395, 403 n.8, 97 Cal. Rptr. 203, 211 n.8 (1971).

[68] *See* note 65 *supra.*

phasis on the development of an exception to the *Reynolds* rule.[69] More specifically, it does not identify the reasoning underlying his reliance on reapportionment decisions and principles to reject the arguments of appellants who had based their claims on a theory of absolute deprivation of the franchise, and not on the dilution of voting power.[70] A close examination of the Court's approach, however, indicates that the development of an exception to the one man-one vote principle was designed not only for its inevitable impact in the area of reapportionment, but also for its conclusive effect on the Court's choice of the appropriate equal protection standard to use in testing the California statute.

It has been observed that underlying the early reapportionment decisions was a basic recognition of the right to vote as fundamental, and that this recognition was a generating factor in the development of the one man-one vote principle.[71] In *Salyer,* by expressly finding the *Reynolds* rule to be inapplicable to this special purpose district, the Court has implicitly acknowledged that within this context, the right to vote is not fundamental. Once divested of this status, albeit implicitly, Justice Rehnquist's application of the rational relationship test logically follows.[72] Given this perspective, the Court's use of reapportionment cases to defeat the appellants' arguments directed at total exclusion from the franchise becomes more understandable. *Kramer, Cipriano,* and *Phoenix,* the exclusion cases relied upon so strongly by the appellants, represented an extended application of the principles articulated in the reapportionment decisions.[73] Once these principles were found to be inapplicable in *Salyer,* the Court was not constrained, as it had been in *Kramer,* to use "close judicial scrutiny" to test the California scheme.[74] Voting in the Tulare Lake Basin Water Storage District is simply not a fundamental right. More precisely, had the Court found the one man-one vote principle applicable in *Salyer,* it would have been implicitly acknowledging the right to vote as fundamental in the context of district elections. A compelling interest test would have naturally followed. Instead, the determination that the

[69] *See* notes 33-45 and accompanying text *supra.*

[70] Of the *Salyer* appellants, only the small landowners were raising an argument based on apportionment principles.

[71] *See* note 9 *supra.*

[72] Under the standard two-tier approach rights which are not fundamental in nature receive protection under the lower standard of review.

[73] *See* text accompanying notes 9-20 *supra.*

[74] Similarly, because voting is not a fundamental right in this context, the principle that legislators are elected by people and not trees does not apply to special purpose districts of this type.

one man-one vote principle was inapplicable represented a value judgment by the Court that the right to vote is nonfundamental insofar as elections for district board of directors are concerned.

III

THE *Salyer* EXCEPTION: ITS IMPACT AND IMPLICATIONS

Despite earlier pronouncements to the contrary,[75] the effect of *Salyer* has been to cast an uncertain shadow over the constitutional protection to which voting is entitled.[76] In the Tulare Water District the failure of the Court to provide voting rights with the protection of a strict scrutiny standard will have the effect of eliminating truly contested district elections because one corporate landowner, by virtue of its holdings, is always assured a majority on the board of directors.[77] Moreover, while the spectre of a universal property qualification would certainly be an unrealistic fear, the Court's decision will inevitably expand the power of other corporations or individuals, similarly situated, to assert a dominant influence in their particular locales. As such, nonproperty owners and small landowners will be "relegated to a position of political powerlessness" in special purpose districts which function on a similar basis.[78]

Salyer also represents a concern by the Court that the reapportionment revolution may have too severely restricted efforts by local governmental units to experiment and innovate. Significantly, the *Salyer* Court's approach to special purpose units

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[75] As recently as Dunn v. Blumstein, 405 U.S. 330, 337 (1972) (citations omitted), the Court stated:

> [I]t is certainly clear now that a more exacting test is required for any statute that "places a condition on the exercise of the right to vote." This development in the law culminated in *Kramer v. Union Free School District.* There we canvassed in detail the reasons for strict review of statutes distributing the franchise, . . . noting *inter alia* that such statutes "constitute the foundation of our representative society." We concluded that if a challenged statute grants the right to vote to some citizens and denies the franchise to others, "the Court must determine whether the exclusions are necessary to promote a compelling state interest."

[76] In *Kramer,* the Court firmly took the position that the "need for exacting judicial scrutiny of statutes distributing the franchise" is unaffected by the purpose of the particular election. 395 U.S. at 628-29. This was the language relied upon for the Court's statement in *Dunn. See* note 75 *supra.* The *Salyer* decision has severely limited the authoritative value of the relevant language in both cases.

[77] As Justice Douglas pointed out: "The hold of J. G. Boswell Co. is so strong that there has been no election since 1947, making little point of the [statutory] provision . . . for an election every other year." 410 U.S. at 735.

[78] It appears, therefore, that the Court has sanctioned the establishment of a suspect classification. *See* notes 14 & 57 *supra.*

and its resulting conclusion closely reflect positions voiced by Justices Harlan and Stewart in earlier dissenting opinions.[79] Dissenting in *Avery*, Justice Harlan argued that the Court's decision, while intending to provide equal protection to all voters, actually discriminated against the county's rural inhabitants because the ruling ignored the fact that they had a *substantially greater interest* in the affairs of the county governing board.[80] Moreover, he warned that rigid application of the one man-one vote principle to local governmental units would effectively "freeze" a functionally necessary trend towards metropolitan consolidation.[81] Later, in *Hadley*, Jus-

[79] It should be noted that Justice Harlan's basic philosophy was that the equal protection clause was not intended to restrict the right of the states to determine apportionment plans for their electoral districts. 377 U.S. at 589-93.

[80] 390 U.S. at 491. Justice Harlan underscored this argument by pointing out that

> [t]he commissioners court . . . performs more functions in the area . . . outside Midland City than it does within the city limits. Therefore, each rural resident has a *greater interest* in its activities than each city dweller. Yet under the majority's formula the urban residents are to have a dominant voice in the county government, precisely proportional to their numbers, and little or no allowance may be made for the greater stake of the rural inhabitants in the county government.

Id. at 491-92 (emphasis added). On this point Justice Fortas was in substantial agreement. *See id.* at 499 (Fortas, J., dissenting).

[81] *Id.* at 492-94. In support of this contention Justice Harlan made the following argument:

> Despite the majority's declaration that it is not imposing a "straightjacket" on local governmental units . . . , its solution is likely to have other undesirable "freezing" effects on local government. One readily foreseeable example is in the crncial field of metropolitan government. A common pattern of development in the Nation's urban areas has been for the less affluent citizens to migrate to or remain within the central city, while the more wealthy move to the suburbs and come into the city only to work. The result has been to impose a relatively heavier tax burden upon city taxpayers and to fragmentize governmental services in the metropolitan area. An oft-proposed solution to these problems has been the institution of an integrated government encompassing the entire metropolitan area. In many instances, the suburbs may be included in such a metropolitan unit only by majority vote of the voters in each suhurb. As a practical matter, the suburbanites often will be reluctant to join the metropolitan government unless they receive a share in the government proportional to the benefits they bring with them and not merely to their numbers. The city dwellers may be ready to concede this much, in return for the ability to tax the suburbs. Under the majority's pronouncements, however, this rational compromise would be forbidden: the metropolitan government must be apportioned solely on the basis of population if it is a "general" government.

Id. (footnotes & citations omitted); *see* Dixon, *Rebuilding the Urban Political System: Some Heresies Concerning Citizen Participation, Community Action, Metros, and One Man-One Vote*, 58 GEO. L.J. 955 (1970); Sentell, *Federalizing Through the Franchise: The Supreme Court and Local Government*, 6 GA. L. REV. 34 (1971); Weinstein, *The Effect of the Federal Reapportionment Decisions on Counties and Other Forms of Municipal Government*, 65 COLUM. L. REV. 21 (1965); Note, *Special Service Districts in a City-County Consolidation: Conflict Between Metropolitan Reform and "One Man-One Vote" in Indianapolis-Marion County*, 47 IND. L.J. 101 (1971); Note, *The Impact of Voter Equality on the Representational Structures of Local Government*, 39 U. CHI. L. REV. 639 (1972). *See generally* M. POCK, INDEPENDENT SPECIAL DISTRICTS: A SOLUTION TO THE METROPOLITAN AREA PROBLEMS (1962); *Symposium: Restructuring Metropolitan Area Government*, 58 GEO. L.J. 663 (1970); Note, *Reapportionment*, 79 HARV. L. REV. 1226 (1966).

tice Harlan, joined by Justice Stewart, maintained that "[t]he need for more flexibility becomes greater as we proceed down the spectrum from the state legislature to the single-purpose local entity,"[82] and on this basis concluded that "specialized local governmental entities" necessarily fell outside the scope of the *Reynolds* principle because of their varied impact on different constituencies.[83] What underlies these opinions is a philosophy articulated by Justice Stewart that when voters are protected by the one man-one vote principle in general elections on the state and federal levels, it is both unnecessary and undesirable to rigidly apply the *Reynolds* rule to situations where different groups have substantially different interests in the matters of a particular unit of local government.[84]

Certainly the Court's willingness to exempt special purpose units from the reach of one man-one vote, and accordingly to

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[82] 397 U.S. at 67. This philosophy seemed to underlie the Court's decision in Ahate v. Mundt, 403 U.S. 182, 185 (1971).

[83] 397 U.S. at 61. Justice Harlan was not speaking directly about the type of situation involved in *Salyer*. His dissent in *Avery* primarily dealt with county units exercising general government powers which affected different groups differently and not with specialized units per se. In *Hadley*, Justice Harlan made the following distinction with specific reference to special purpose units:

> If local units having general governmental powers are to be considered, like state legislatures, as having a substantial identity of function that justifies imposing on them a uniformity of elective structure, it is clear that specialized local entities are characterized by precisely the opposite of such identity. From irrigation districts to air pollution control agencies to school districts, such units vary in the magnitude of their impact upon various constituencies and in the manner in which the benefits and burdens of their operations interact with other elements of the local political and economic picture. Today's ruling will forbid these agencies from adopting electoral mechanisms that take these variations into account.

Id. Note however that the *Hadley* Court, citing Sailor v. Kent Bd. of Educ., 387 U.S. 105 (1970), and Dusch v. Davis, 387 U.S. 112 (1970), maintained that the Constitution does permit flexibility and experimentation on the local level and that the states' efforts in this area have not been inhibited. 397 U.S. at 58; *see* note 6 *supra*.

[84] Dissenting in *Kramer*, Justice Stewart argued:

> [W]e are dealing here, not with a general election, but with a limited, special-purpose election. The appellant is eligible to vote in all state, local, and federal elections in which general governmental policy is determined . . . . *He clearly is not locked into any self-perpetuating status of exclusion from the electoral process.*

395 U.S. at 640 (footnotes omitted, emphasis added). Justice Stewart seemed to be suggesting that the right to vote in special purpose district elections is not fundamental because the individual's interests are adequately guarded by his right to vote in all general, local, state, and federal elections.

As to special purpose units, Justice Stewart remarked:

> Special-purpose governmental authorities such as water, lighting, and sewer districts exist in various sections of the country, and participation in such districts is undoubtedly limited in many instances to those who partake of the agency's services and are assessed for its expenses. The constitutional validity of such a policy is, it seems to me, unquestionable.

Id. at n.9.

apply a less stringent test in evaluating infringements on the right in district elections, will permit more flexibility than the pre-*Salyer* strict scrutiny approach. As such, the decision's impact will no doubt be substantial because as of 1967 "there were at least 21,264 special districts in the United States—a total that exceeds the number of all cities and counties combined."[85] This surely will result in a considerable increase in litigation, for the *Salyer* Court did not enunciate general standards to determine whether a particular district falls within its rationale. The lack of adequate standards is of added independent significance because future decisions may therefore turn on subjective considerations. As a result, in many cases the party seeking relief will be made extremely vulnerable to possible disenfranchisement when his "lack of a 'substantial interest' might [really] mean no more than a different interest" politically or otherwise.[86]

To what extent this newly carved exception to *Reynolds* will emasculate the one man-one vote principle will ultimately depend upon the degree of recognition the Court is willing to give to the Harlan-Stewart concept of "substantial interest."[87] Yet, even in the absence of guidelines, state legislatures should be aware that merely labeling a local governmental unit as a special purpose district will not automatically trigger a favorable reaction by the Supreme Court. For example, the junior college district in *Hadley* arguably may have been considered a special purpose unit, but the Court held that it was subject to the mandate of one man-one vote.[88] If a guiding standard may be discerned from Justice Rehnquist's opinion, it is that a special purpose district must have a "special limited purpose" which is "far removed from normal governmental activities" and which "disproportionately affect[s] different groups."[89] Given this standard, the junior college district

[85] U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, *supra* note 24, at 37. This figure does not include school districts. Note that while the number of these units in 1967 was 21,264, at that time their rate of growth was 16%. *Id.* at 41.

[86] Evans v. Cornman, 398 U.S. 419, 423 (1970). The Court, citing Carrington v. Rash, 380 U.S. 89 (1965), warned that " '[f]encing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible." *Id.*

[87] *See generally* notes 79-84 *supra.*

[88] The junior college trustees had authority to

> levy and collect taxes, issue bonds with certain restrictions, hire and fire teachers, make contracts, collect fees, supervise and discipline students, pass on petitions to annex school districts, acquire property by condemnation, and in general manage the operations of the junior college.

397 U.S. at 53 (footnote omitted). *Compare* notes 24-25 and accompanying text *supra. See also* note 35 *supra.*

[89] 410 U.S. at 727-28.

in *Hadley* did not qualify because "[e]ducation has traditionally been a vital governmental function,"[90] and it would therefore seem that local school boards would be similarly disqualified. Nor, as the Court suggests, would a special purpose unit which, in addition to its designated purpose, provides "other general public services such as schools, housing, transportation, utilities, roads, or anything else of the type *ordinarily* financed by a municipal body," be able to fit within the exception.[91] Finally, a salient feature of *Salyer* was Justice Rehnquist's concentration on the economic operations of the district, and on what he perceived to have been the disproportionate economic burdens shouldered by landowners.[92] As a result of the Court's emphasis on economic considerations, it is posited that *Salyer* contemplates the existence of both a "special limited purpose" and the imposition of disproportionate economic consequences upon a readily definable class as necessary prerequisites to the application of the one man-one vote exception. Until the Court further clarifies its position, future legislative decisions should be made with these considerations in mind.[93]

CONCLUSION

In *Salyer,* the Supreme Court sustained a proportional voting scheme which effectively denies the franchise to those otherwise qualified voters who hold no property, and which emasculates the vote of small landowners. This has been accomplished by carving an exception to what had been a well-established reapportionment principle. The Court's decision was partially in response to the needs of local government for greater flexibility and for extended opportunities for innovation.[94] Whether *Salyer* will provide local

[90] 397 U.S. at 56.

[91] 410 U.S. at 728-29 (emphasis added).

[92] *Id.* at 729-34; *see* note 59 *supra.*

[93] The guidelines formulated here have been deliberately designed to narrowly construe the potential scope of the *Salyer* exception. Although the Court's actual standards might be more flexible, the legislator should be cognizant of the decision's possible limitations. *See generally* notes 43-45 and accompanying text *supra.*

[94] Justice Harlan's viewpoints on this matter (*see* note 81 *supra*) are by no means universally accepted. There have been arguments that reapportionment has provided a fresh impetus to local government, has encouraged city-county cooperation, and has generally created a wide range of new alternatives for reform. *See* Grant & McArthur, *"One Man-One Vote" and County Government: Rural, Urban, and Metropolitan Implications,* 36 GEO. WASH. L. REV. 760 (1968); Hergert, *The Impact of the Fourteenth Amendment on the Structure of Metropolitan and Regional Governments,* 23 HASTINGS L.J. 763 (1972); Jones, *Metropolitan Detente: Is It Politically and Constitutionally Possible?,* 36 GEO. WASH. L. REV. 741 (1968); McKay, *Reapportionment and Local Government,* 36 GEO. WASH. L. REV. 713 (1968).

units with more flexibility is problematical and of secondary importance. The more fundamental question to be resolved is whether the benefits which actually accrue will have been worth jeopardizing the concept of voting as a fundamental right.

Michael Goldsmith